situation results from the defect or negligent act causing the injury,[10] it was properly held that, being unaware of the existence of the particular defect, she did not assume the risk of the injury resulting. Conversely the risk is not assumed if the plaintiff does not fully appreciate the danger arising from a known defect.[11] Appreciation of the danger and knowledge of the defect are thus both essential elements in the servant's assumption of the risk. Either may be imputed as a matter of law; the former, if knowing the defect, a reasonably intelligent man could not fail to perceive the relation of cause and effect between it and the danger;[12] the latter, if the defect be obvious, or bound to be observed by the servant in the course of his employment.[13] The fact that it is discoverable will not aid the employer, as the employee is entitled to presume that the master's duty of inspection has been performed, and he is therefore under no duty to search for imperfections.[14] In the event that knowledge and appreciation cannot be imputed to the plaintiff as a matter of law, their existence must be found as a fact by the jury in order to defeat the right of action.[15]

THE INSURER'S CONTRACT WITH THE MORTGAGEE UNDER THE MORTGAGEE CLAUSE.—While to-day the contract of insurance[1] is universally considered a contract of indemnity,[2] the principle of indemnity is often misunderstood[3] and the earlier conception of the insurance contract as a

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[10]Smith *v.* Baker, L. R. [1891] A. C. 325; see Osborne *v.* London etc. Ry. Co. (1888) L. R. 21. Q. B. D. 220; *contra,* Scanlon *v.* Wedger (1892) 156 Mass. 462—The dissenting opinion seems preferable.

[11]Millen *v.* Pacific Bridge Co. (1908) 51 Ore. 538; Miner *v.* Telephone Co. (1910) 83 Vt. 311. Realization of the extent or character of the injury sustainable is not, however, necessary. National Steel Co. *v.* Hore (1907) 155 Fed. 62.

[12]"Where the elements and combination out of which the danger arises, are visible it cannot always be said that the danger itself is so apparent that the employee must be held, as a matter of law, to understand, appreciate and assume the risk of it** But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence and adequate experience * * * the question becomes one of law for the decision of the Court." Moody J. in Butler *v.* Frazee (1908) 211 U. S. 459, 466, 467; Hightower *v.* Gray (1904) 36 Tex. Civ. App. 674.

[13]Tex. Co. *v.* Garrett (Tex. 1911) 134 S. W. 812; Moulton *v.* Gage (1885) 138 Mass. 390. Due regard must be had for the employee's youth or inexperience. Demars *v.* Glen Mfg. Co. (1892) 67 N. H. 404.

[14]Tex. etc. Ry. *v.* Archibald (1898) 170 U. S. 665; Miner *v.* Telephone Co. *supra.*

[15]Williams *v.* Birmingham etc. Co. L. R. [1899] 2 Q. B. D. 338.

[1]As to the nature of a contract of life insurance see Grigsby *v.* Russell (1911) 222 U. S. 149.

[2]Vance, Insurance, 52.

[3]Such policies were undoubtedly allowed until the passage of 19 Geo. II c. 37 (1746) which prohibited the making of further assurances "interest or no interest." See Depaba *v.* Ludlow (1726) 1 Com. 360; Assievedo *v.* Cambridge (1711) 10 Mod. 77; 2 Park, Ins. (6th ed.) 259 *et seq.*

wagering policy seems to lie at the root of many decisions.[4] The insured may not recover without proof of loss,[5] since indemnity presupposes loss to the insured and reimbursement by the insurer,[6] nor should he recover in excess of his actual loss, for in that event he will receive more than indemnity.[7] Yet where the insured's interest is less than entire and unlimited legal ownership the courts have often allowed a recovery for the full value of the property destroyed, on the theory that the insurance is against loss to the property and the injury to the property is, therefore, the true measure of damage.[8] Under this theory the insurance policy must be considered a wagering contract, with this modification, that the insured need show only some "insurable interest" as a condition precedent to recovery of the full value of the property insured, without inquiry as to the actual loss suffered by him.[9] "Insurable interest," however, is predicated solely upon the capacity to suffer loss through the happening of the event insured against.[10] Inasmuch as this capacity can exist only in so far as the insured has an interest in the property, it seems clear that the measure of indemnity should be the damage to that interest[11] and not arbitrarily the full damage to the property itself.[12]

As a logical consequence it follows that if the damage to the insured's interest has been in any way diminished before the bringing of the suit against the insurer, the indemnity to which the insured

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[4]Thus the attitude of the courts in sustaining the so-called "valued policy," in which the parties estimate the amount of damage in advance, receives an historical explanation. As a general rule, the reasonableness of the amount agreed upon by the parties as liquidated damages is always the subject of inquiry, 1 Sedgwick, Damages, § 407, but in the case of the valued policy this estimate is regarded as conclusive, in the absence of fraud, accident or mistake, Sturm *v.* Atl. Mut. Ins. Co. (1875) 63 N. Y. 77, and the recovery may be very disproportionate to the actual loss suffered. See Barker *v.* Janson (1868) L. R. 3 C. P. 303.

[5]Weightman *v.* Union Trust Co. (1904) 208 Pa. 449.

[6]Riggs *v.* C. M. Ins. Co. (1890) 125 N. Y. 7.

[7]Tabbutt *v.* Am. Ins. Co. (1904) 185 Mass. 419.

[8]Convis *v.* Citizens' etc. Ins. Co. (1901) 127 Mich. 616 (life tenant); Merrett *v.* Farmers' Ins. Co. (1875) 42 Ia. 11 (husband's homestead interest in wife's property); Franklin etc. Ins. Co. *v.* Drake (Ky. 1841) 2 B. Mon. 47 (husband's marital privilege to use and enjoy wife's property).

[9]Full recovery in such case might be allowed on the anomalous theory of the valued policy. See Merrett *v.* Farmers' Ins. Co. *supra.*

[10]Vance, Insurance, 47, 52.

[11]Where the life tenant is allowed full recovery, some courts compel him to hold the amount received in excess of his interest for the remainderman, Green *v.* Green (1897) 50 S. C. 514, while other courts allow him to retain the whole since he has not acted as agent or trustee in procuring the policy. Bennett *v.* Featherstone (1902) 110 Tenn. 27; Harrison *v.* Pepper (1896) 166 Mass. 288.

[12]Tabbutt *v.* Am. Ins. Co. *supra* (conditional vendee); Beekman *v.* Fulton etc. Ins. Co. (N. Y. 1901) 66 App. Div. 72) (life tenant). An insured having the beneficial use and enjoyment of the property might well recover more than the value of his interest computed by mathematical tables, see 11 Harv. L. Rev. 512, 518, but the recovery of a mortgagee insuring only his own interest is limited to the extent of the mortgage debt. 10 COLUMBIA LAW REVIEW 153.

is entitled is reduced in like amount.[13] It is apparent then that in seeking recovery the insured has the option to pursue either of two courses: to proceed directly against the insurer or first to exhaust other claims which he may have in respect to the damaged property. The result of the adoption of the latter course is clearly pointed out by the New York court in the case of *Heilbrunn* v. *German Alliance Ins. Co.* (N. Y. 1912) 135 N. Y. Supp. 769. The insured, a mortgagee, exercised his option by proceeding against the mortgagor after the loss and before bringing suit against the insurer. He then sued the insurance company, but as the debt had been paid in full he could not show in what way he had been damaged, and the court, therefore, properly denied him recovery. Where the former course is adopted and the insured proceeds directly against the insurer, justice requires that the same result be ultimately reached through the process of subrogation. Universally, the insurer may stand in the insured's shoes with reference to the latter's right against a tort feasor, who has been responsible for the loss, for in that case as between parties who are under obligation to make good a loss, the one who has caused the loss is equitably bound to bear the burden.[14] If the premise taken above be true and the promise of indemnity is not for damage to the property but for damage to the insured's interest therein, the right of subrogation should be extended to include contractual and other claims which the insured may have in the property. The right is in its nature equitable; it does not depend upon contract between the parties[15] and if the insured receives the amount of his claim in addition to reimbursement for the loss of security it is obvious that he is made doubly whole.[16] Finally, as a corollary to this right of subrogation, it is evident that if the insured has, after payment by the insurer, received satisfaction of his claim against the third person in respect to his interest in the insured property, the insurer may sue for the excess the insured has received over and above indemnity.[17]

MALICIOUS USE OF PROPERTY.—The view taken by a unanimous court in the recent case of *Norton* v. *Randolph* (Ala. 1912) 58 So. Rep. 282, that equity will enjoin the malicious erection of a spite fence,

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[13]Parker *v.* Eagle Fire Ins. Co. (1857) 75 Mass. 152; Hadley *v.* N. H. Ins. Co. (1875) 55 N. H. 110.

[14]Hall *v.* The Railroad Cos. (U. S. 1871) 13 Wall. 367; Hart *v.* Western R. R. Corp. (Mass. 1847) 13 Metc. 99.

[15]St. Louis etc. Ry. Co. *v.* Commercial Union Ins. Co. (1890) 139 U. S. 223. But in Massachusetts before the passage of a statute allowing this right the insurer could not claim subrogation to the right of a mortgagee against the mortgagor. Suffolk Fire Ins. Co. *v.* Boyden (1864) 91 Mass. 123.

[16]Castellain *v.* Preston (1883) L. R. 11 Q. B. D. 380; Darrell *v.* Tibbits (1880) L. R. 5 Q. B. D. 560; Sussex etc. Ins. Co. *v.* Woodruff (1857) 26 N. J. L. 541.

[17]Castellain *v.* Preston *supra* (recovery of insurance money after payment of mortgage debt to insured, the mortgagee); Darrell *v.* Tibbits *supra* (recovery from lessor after lessee had performed agreement to repair). And if the insured has released any rights against third persons to which the insurer might have been subrogated the insurer may, after payment to the insured, recover the damage suffered thereby. Phœnix Ass. Co. *v.* Spooner L. R. [1905] 2 K. B. 753.